Supreme Court, U. S.
FILED
FEB 29 1980
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1341

PETER W. BOWMAN, M.D.,
APPELLANT,
v.
MAINE STATE EMPLOYEES APPEALS BOARD ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF THE STATE OF MAINE.

Jurisdictional Statement.

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Jurisdictional Statement.

Peter W. Bowman, M.D., appeals from a final judgment of the Supreme Judicial Court of Maine, entered December 4, 1979, holding that Maine P.L. 1971, ch. 350, is constitutional and does not violate the Contracts Clause, Article I, § 10, or the Due Process Clause, Amendment 14, of the United States Constitution.

Opinions Below.

The opinion of the Maine Supreme Judicial Court, which appears at Appendix pp. 1a-14a, is reported at 408 A. 2d 688 (1979).

The decision and order of the Maine Superior Court, dated February 11, 1978, and filed February 15, 1978, Docket Nos. 74-514 and 74-517, is not reported. It is reprinted at Appendix pp. 15a-24a.

The decision of the Maine State Employees Appeals Board, dated September 30, 1974, is not reported. It is reprinted at Appendix pp. 25a-29a.

Jurisdiction.

On December 4, 1979, the Supreme Judicial Court of Maine entered its final judgment denying Dr. Bowman's appeal from a judgment of the Maine Superior Court. The Maine court held that the enactment of P.L. 1971, ch. 350, by the Maine Legislature and its application to effectuate termination of Dr. Bowman's Maine state civil service employment did not violate the Contracts Clause (Article I, § 10) or the Due Process Clause (Amendment 14) of the United States Constitution.

A notice of appeal to this Court was duly filed in the Supreme Judicial Court of Maine on February 20, 1980. This appeal is being docketed in this Court within 90 days from the entry of the judgment below.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Questions Presented.

1. Does the Contracts Clause of the United States Constitution (Article I, § 10) prohibit the State of Maine from retroactively removing Dr. Bowman's state civil service job security rights (without abolishing his position) and then discharging him without hearing or cause?

2. Does the Due Process Clause of the Constitution prevent the State of Maine from arbitrarily and summarily depriving Dr. Bowman of his property right in his civil service employment by legislatively removing his civil service protection and then terminating his employment without hearing or cause?

Constitutional Provisions and Statutes.

Article I, § 10, and the Fourteenth Amendment of the United States Constitution are set forth at Appendix p. 30a.

Maine P.L. 1971, ch. 350, is set forth at Appendix pp. 30a-33a.

The Maine civil service statutes from which Dr. Bowman's contractual and property rights derive, P.L. 1947, ch. 192, § 1; P.L. 1957, ch. 313; R.S. 1954, ch. 63, § 21; and 5 M.R.S.A. §§ 671 and 678 (as in effect at time of termination), are set forth at Appendix pp. 33a-36a.

Raising the Federal Question.

Appellant initially raised the claim that Maine P.L. 1971, ch. 350, violated the United States Constitution in his petition for redress of grievances to the Maine State Employees Appeals

Board which originated these proceedings. The Appeals Board rejected this claim and held that ch. 350 was effective to permit Dr. Bowman's discharge without cause. Appendix pp. 26a-27a. The same constitutional claim was raised upon appeal from the Board to the Maine Superior Court. That court also treated the statute and Dr. Bowman's discharge as valid. Appendix p. 20a.

Dr. Bowman then appealed to the Maine Supreme Judicial Court solely on the ground that P.L. 1971, ch. 350, and its application to him violated the Contracts and Due Process Clauses of the United States Constitution and corresponding provisions of the Maine Constitution. The Maine court of last resort expressly held that the statute in question and its application to Dr. Bowman did not violate the cited provisions of either the United States or the Maine Constitution. Appendix p. 11a.

Statement of the Case.

1. On April 9, 1953, appellant, Peter W. Bowman, M.D., was appointed superintendent of the Pownal State School, Pownal, Maine, which later became the Pineland Hospital and Training Center ("Pineland").

2. From the time of his original employment until his termination in September, 1971, Dr. Bowman's employment was statutorily protected from termination except for defined cause and after specified hearing and appeal procedures. Prior to 1957 this protection was afforded by R.S. 1944, ch. 23, § 96 (as enacted by P.L. 1947, ch. 192, § 1). Appendix p. 33a. On August 28, 1957, Dr. Bowman and the other institutional superintendents were incorporated into the Maine state classified civil service system by P.L. 1957, ch. 313. Appendix p. 34a.

The applicable civil service statute (Appendix pp. 34a-36a) prohibited dismissal of classified employees except for "cause" and granted permanent employees the protections of appeals and arbitration proceedings, e.g., 5 M.R.S.A. §§ 751-753.

From 1953 to 1971 Dr. Bowman served as superintendent of Pineland and achieved a national and international reputation in the field of care and treatment of the mentally retarded.

3. On May 25, 1971, Maine P.L. 1971, ch. 350, was signed into law, effective September 23, 1971. Chapter 350 removed from the Maine state classified service the superintendencies of Pineland, the Bangor Mental Health Institute and the Augusta Mental Health Institute, making them appointive positions for four-year terms "or during the pleasure of the commissioner and the Advisory Committee on Mental Health." Appendix p. 32a.

4. Chapter 350 was passed into law as an amendment to L.D. 1490, S.P. 469, a bill which had nothing to do with Pineland but which created two new positions, a Director of Nursing and a Director of Training and Education, and changed the status of the superintendent at the Augusta Mental Health Institute.* No legislative hearing was held on the amendment. Dr. Bowman was neither notified nor consulted as to the provision which declassified his position.

The powers, responsibilities, title and pay of the unclassified superintendent of Pineland are the same as those of the former classified superintendent.

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* The amendment was drafted while the bill was in committee by William F. Kearns, Commissioner of Mental Health and Corrections, and Dr. Bowman's immediate superior, in response to complaints about the language of the original bill affecting only Augusta. Commissioner Kearns, on his own initiative, drafted the new provision to declassify the superintendencies of both the Pineland and the Bangor facilities in addition to the Augusta facility and submitted the amendment within 24 hours of the committee's request.

5. On July 16, 1971, Dr. Bowman received oral notification that he would not be retained after the effective date of P.L. 1971, ch. 350, and that he would not be appointed superintendent under the new law. At no time was Dr. Bowman given a written explanation of the decision to terminate his employment or of any charges of inadequacy of his past performance as superintendent of Pineland. At no time was he given the opportunity to defend his past performance or to show that he was a qualified and appropriate candidate and that he should be retained as a classified employee or appointed to the unclassified position.

6. On September 23, 1971, P.L. 1971, ch. 350, went into effect and Dr. Bowman's employment was terminated. He was the only one of the three formerly classified superintendents to be terminated as a result of the law going into effect. The superintendent of the Augusta Mental Health Institute had resigned on July 2, 1971, and the superintendent of the Bangor Mental Health Institute was appointed to the unclassified service and received the same salary.

7. On September 10, 1971, Dr. Bowman filed a petition for redress of grievances with the Maine State Employees Appeals Board. After extensive hearings, including the presentation of exhibits and examination of witnesses, the Board specifically found that:

"Dr. Bowman devoted his best professional efforts to his employer from April 1953 to September 23, 1971 — approximately 18½ years — and did an outstanding and meritorious job." Appendix p. 26a.

"[A]ll aspects of [Dr. Bowman's] tenure and non-retention were handled" in an "unfair manner." Appendix p. 27a.

Nevertheless, the Board held that:

"The Board is bound by [the] law as enacted by the Legislature." Appendix p. 27a.

"Although the law precipitated three changes in job status, there was no violation of the 1st or 14th amendment and Dr. Bowman's claim for reinstatement is denied." Appendix p. 27a.

Dr. Bowman appealed the Board's decision to the Maine Superior Court. The Superior Court "presume[d]" the constitutionality of P.L. 1971, ch. 350, (Appendix p. 20a), and upheld the State Employees Appeals Board's determination that there had been no violation of the Maine or United States Constitution in this summary termination of Dr. Bowman's employment.

Dr. Bowman then appealed to the Maine Supreme Judicial Court solely on the question of the constitutionality of P.L. 1971, ch. 350, and the retroactive application of that law to oust him from his position. As stated before, the Maine court held:

1. "Dr. Bowman did not have a relationship with the State of Maine governing his employment at Pineland which was protected by either the contract clause in the Maine Constitution or that of the Constitution of the United States," Appendix p. 9a; and

2. "[T]he root from which these due process contentions sprout is the premise that Dr. Bowman's position was contractually secured, a premise we have here disavowed. The foundation of the due process argument having been eliminated, the argument itself must collapse." Appendix p. 13a.

The Maine court accordingly denied Dr. Bowman's appeal. From this denial this final appeal is taken. Appendix p. 37a.

The Questions Are Substantial.

According to the decision below, no public civil service employee ever has an interest in his livelihood sufficient to in-

voke constitutional protection against arbitrary deprivation by the State. This is so regardless of the explicitness of the protections afforded by the civil service statute and regardless of the reasonableness of the employee's reliance upon these protections.

Such a construction of the scope and meaning of both the Contracts Clause (Article I, § 10) and the Due Process Clause (Amendment 14) of the United States Constitution is not in accord with the construction of these provisions as developed and enunciated by this Court. The conflict, vitally affecting the rights of all civil service employees and the interests of the governments which employ them, raises substantial federal questions.

1. MAINE P.L. 1971, CH. 350, IS INVALID BECAUSE REPUGNANT TO THE CONTRACTS CLAUSE, ARTICLE I, § 10, OF THE UNITED STATES CONSTITUTION.

Dr. Peter Bowman, as a classified civil service employee of the State of Maine, had accepted and meritoriously performed for 18½ years in public employment, subject to express protective statutory provisions that his employment would not be terminated except for "cause" and in accordance with defined hearing and appeal procedures. See Maine P.L. 1947, ch. 192; R.S. 1954, ch. 63, § 21; 5 M.R.S.A. §§ 678 and 751-753 (Appendix pp. 33a-36a). These special protective provisions, governing the very heart of the employment relationship, were extended by the State and accepted by Dr. Bowman as the basis of his action in accepting and continuing classified professional public employment, in effect dedicating his career to public service. Personnel department rules and personnel recruiting pamphlets published and circulated at the time of

Dr. Bowman's entry into the civil service emphasized these protections as "rights" of career civil servants. Dr. Bowman's good faith reliance upon these provisions cannot constitutionally be rewarded by arbitrary termination, without cause, and in the face of an undisputed finding that he "devoted his best professional efforts to his employer . . . and did an outstanding and meritorious job." Appendix p. 26a.

This case should be governed by this Court's decision in *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938), which also involved the retroactive application of a state statute repealing legislatively-granted job security rights. This Court found the Indiana statute invalid under the Contracts Clause as impairing the contractual rights of the public employees (teachers) affected.

The court below distinguished *Brand*, first, on the ground that the Supreme Court had there emphasized Indiana decisions recognizing the contractual nature of the employment of teachers; and, second, on the ground that the statute in *Brand* had specifically used the term "contract." But neither of these factors can be considered controlling. Both were absent in *American Smelting & Refining Co.* v. *Colorado*, 204 U.S. 103 (1907), another case in which this Court overturned a state court ruling that rights created by a state statute were noncontractual.

A careful reading of *Brand* indicates that reliance was a controlling concept.

> "Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Art. I, § 10." 303 U.S. at 100.

By contrast, in *Dodge* v. *Board of Education*, 302 U.S. 74 (1937), relied on below, reliance interests were weak at best, since the Illinois court had, for many years prior to the enactment of the statute establishing teacher retirement benefits, construed virtually identical statutes as conferring mere gratuities and not contractual rights. In *Phelps* v. *Board of Education*, 300 U.S. 319 (1937), while the statute in question provided explicit protection for individual employees against arbitrary school board action, it did not explicitly deal with general salary cuts and therefore ought not to have been relied on for protection against general budgetary emergencies.

The reliance interests of Dr. Bowman are clear in the present case. Specific protective provisions against arbitrary discharge were in effect at the time of his original hiring and throughout his tenure. *See* P.L. 1947, ch. 192, § 1 (Appendix p. 33a); R.S. 1954, ch. 63, § 21, and 5 M.R.S.A. § 678 (Appendix pp. 34a-36a). While the precise formulation varied, the essential guarantee that he could be fired only for cause and only according to specific notice and hearing procedures remained constant. The State Personnel Department in its publications invited prospective and current employees to rely on these provisions, speaking consistently in terms of the rights conferred on employees. The vital character of the employees' interests involved and the use made of the statutory scheme in recruitment of employees preclude an interpretation of these protective provisions as a mere regulation of the conduct of the State's business, conferring no rights on individuals. Such an interpretation would do violence to the principle that legislative enactments, "when accepted as the basis of action by individuals, become contracts" (*Indiana ex rel. Anderson* v. *Brand*, 303 U.S. at 100), at least when, as here, benefits have been conferred on the State by the faithful efforts of the individuals involved.

And the question whether a contractual right exists is, in the final analysis, for this Court.

> ". . . we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938).

In *Detroit United Railway* v. *Michigan*, 242 U.S. 238 (1916), the contract alleged to be impaired arose out of a local legislative enactment. This Court rejected the Michigan Supreme Court's interpretation of local law, stating that:

> ". . . it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation?" 242 U.S. at 249.

This Court is free to find that a contract exists for the purpose of Article I, § 10, despite a state court ruling that no contract exists under state law. *American Smelting & Refining Co.* v. *Colorado*, 204 U.S. 103 (1907); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938). Even where a state constitutional provision is at issue, this Court may be

> ". . . compelled to differ with . . . [the state] court [on] the nature and extent of the [state] constitutional limitation of this contract, as made by the legislature of the

same State. For this constitution necessarily becomes a part of the contract which is said to be impaired by subsequent legislation." *Northwestern University* v. *People*, 99 U.S. 309, 323 (1878).

Once having determined that Dr. Bowman is protected by the Contracts Clause, the invalidity of P.L. 1971, ch. 350, is readily apparent. Dr. Bowman's rights to continued employment protected from arbitrary discharge were not merely impaired, they were utterly destroyed. His job was legislatively removed from the coverage of civil service protection and his employment was then and there terminated, without cause, without a hearing, without recourse.

> "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy . . . destruction of contracts or the denial of means to enforce them." *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 439 (1934).

The court below suggested some (apparently newly emerged) interest of the State in favor of politically responsive "policy-making" employees (Appendix p. 12a), which would justify the removal of civil service protection from Dr. Bowman. But recently, in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21 (1977), this Court held that even the "existence of an important public interest is not always sufficient

to overcome [the] limitation" of a State's police power by the Contracts Clause. There, the Court enunciated a requirement that an impairment must be "both reasonable and necessary to serve the . . . important purposes claimed by the State." 431 U.S. at 29. It also held that the State "is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." 431 U.S. at 31.

In view of the finding by the State Employees Appeals Board that Dr. Bowman had always done "an outstanding and meritorious job" as superintendent of Pineland (Appendix p. 26a), the importance of applying this policy to destroy Dr. Bowman's job security is hard to discern. While greater political responsiveness and a closer working relationship between the Commissioner and the superintendent of Pineland may have come to be preferred as a policy matter by the Legislature over the political independence and professionalism fostered by civil service, such a changing policy does not give rise to a *necessity* sufficient to justify the stripping of job protection from an admittedly competent, dedicated career superintendent. The state civil service law already provided ample mechanism for the disciplining of an incompetent or recalcitrant superintendent. Against the loss of Dr. Bowman's livelihood and termination of his career of close to 20 years, the public interests suggested by the court below are scarcely substantial enough to justify suspension of a fundamental constitutional limitation on state power.

2. Maine P.L. 1971, ch. 350, is Invalid Because it Deprives Dr. Bowman of Property Without Due Process.

Even if the civil service statutes and rules relied on by Dr. Bowman do not create a contractual relationship, they clearly create a property interest as defined by recent decisions of this

Court: *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); and *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978). The question of what constitutes property protected by the Fourteenth Amendment is for this Court to determine:

> "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 9 (1978), citing *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 602 (1972).

Contrary to the view enunciated by the court below, protected property interests need not be embodied in any "contract," but

> ". . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

And in this case there certainly were

> ". . . rules or mutually explicit understandings that support [Dr. Bowman's] claim of entitlement to the benefit." *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972).

These rules are embodied in statutes as well as in the regulations and policies of the Maine Personnel Board.

The majority of courts, state and federal, which have faced this issue have held that public employment statutes providing for job security, with removal only for cause, create protected property interests. *Roberts* v. *City of Tucson*, 122 Ariz. 125, 593 P. 2d 679 (1979); *Skelly* v. *State Personnel Board*, 15 Cal. 3d 194, 124 Cal. Rptr. 14 (1975); *Brownlee* v. *Williams*, 233 Ga. 548, 212 S.E. 2d 359 (1975); *Thurston* v. *Dekle*, 531 F. 2d 1264 (5th Cir. 1976); *contra*, *Colburn* v. *Personnel Commission*, 118 N.H. 60, 382 A. 2d 907 (1978); *Association of Capital Powerhouse Engineers* v. *Division of Buildings and Grounds*, 89 Wash. 2d 177, 570 P. 2d 1042 (1977).

Confining itself to the notion that "the root from which these due process contentions sprout is the premise that Dr. Bowman's position was contractually secured" (Appendix p. 13a), the Maine court failed to appreciate the substance of Dr. Bowman's legitimate entitlements arising from the State's own statutes, rules and regulations. Those entitlements clearly qualify for protection under the Fourteenth Amendment as consistently construed by this Court.

Having determined that Dr. Bowman possessed, prior to enactment of P.L. 1971, ch. 350, a legitimate claim of entitlement, it becomes necessary to determine whether the enactment of that statute and its retroactive application to Dr. Bowman met the requisites of due process. The statute is challenged only insofar as it applies retroactively to the three incumbents of the affected positions. In this context "due process" requires that if a person reasonably relies on legislation enacted to induce such reliance, the State may not lightly take away the relied-upon rights so as to leave the person seriously disadvantaged. "It is a purpose of the ancient institution of property to protect those claims upon which people rely in

their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents* v. *Roth*, 408 U.S. at 577.

Statutes such as civil service laws are calculated to and do induce a high degree of reliance by those who forgo other, more lucrative opportunities in favor of secure employment with the State. Dr. Bowman had every reason to expect that if these protections were changed he would be given reasonable opportunity to adjust by continued protection, a transition term, or consideration for appointment to the unclassified position. He got none of this, not even the opportunity to apply for the unclassified job. Appendix p. 29a. His reliance earned him immediate, arbitrary termination after 18½ years of meritorious and distinguished service.

The Maine Legislature, recognizing the harshness and unfairness of summarily upsetting the legitimate reliance of state civil service employees, has consistently made special provision for the protection of incumbents when civil service positions have been subject to governmental reorganization. See, e.g., P.L. 1975, ch. 781 (reorganizing the Department of Commerce), and P.L. 1977, ch. 674 (adding numerous positions to the unclassified noncivil service list, but providing for continued classified status for incumbents until January 1, 1983). The decision not to protect the incumbents in the present case amounts to a legislative finding, made without notice to those affected or any kind of hearing, that at least one of the three persons involved was somehow unsatisfactory and should have been discharged.

Fundamental due process norms are offended by this type of retroactive, narrowly focused legislation. As Professor Tribe has said:

> "government must decide how *prospective* and how *general* to make its actions. To the extent they are *retrospective*, however, they may neither frustrate justified reliance

> without good cause nor inflict condemnation without clear prior authority; and to the extent that they *focus on specific persons*, they may not be effected without safeguards closely akin to those of judicial trial." Tribe, *American Constitutional Law* 501 (1978) (emphasis in original).

While the issue of notice and hearing requirements in legislative process has not often been presented, this Court has held that due process does require some kind of hearing for those affected by a legislative enactment which infringes on the legitimate interest of only a very few individuals. In *Londoner* v. *Denver*, 210 U.S. 373 (1908), this Court held that individuals affected by legislative action of a city council on a sewer assessment ordinance were entitled to a hearing upon their individual assessments. Later, in *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 446 (1915), this Court referred to its decision in *Londoner* in terms which could equally apply to the present case:

> "A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing."

Contrast *Bowles* v. *Willingham*, 321 U.S. 503, 519 (1944), where this Court conceded:

> "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption."

In this case, P.L. 1971, ch. 350, directly affected only three persons. The feature declassifying Dr. Bowman's job was added as an amendment. No hearing, legislative or otherwise, was held on this portion of the bill by which he was so exceptionally affected. No notice was given to Dr. Bowman of the proposed action, despite the requirement of Maine House of Representatives Rule No. 48 that: "No act or resolution shall be passed affecting the rights of individuals or corporations without previous notice to such individuals or corporations."

Dr. Bowman's claims to procedural and substantive due process are further supported by the decision of this Court in *Bell* v. *Burson*, 402 U.S. 535 (1971), overturning Georgia's statutory scheme allowing summary deprivation of drivers' licenses. The Court in *Bell* weighed heavily the substantial interest of a driver in keeping a license, since:

> "Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood." 402 U.S. at 539.

Here, Dr. Bowman was directly deprived of his livelihood without notice, cause, hearing, or any explicit statement of legitimate necessity, after 18½ years of service to the State. To this decision, the court below applied a minimal rationality test. Appendix pp.11a-12a. Under *Bell*, however, where individuals' livelihoods are involved, mere rationality is not the applicable standard. Instead, the interests of the affected individuals must be balanced against the state interest involved. In *Bell*, the Court held that:

> "In cases where there is no reasonable possibility of a judgment being rendered against a licensee, Georgia's interest in protecting a claimant from the possibility of an unrecoverable judgment is not, within the context of the State's fault-oriented scheme, a justification for denying the process due its citizens." 402 U.S. at 540.

In the present case, adequate procedures existed under the civil service system for removing employees for any reasonable cause. Compare *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 108 (1938), where this Court noted that the Indiana statute (like the Maine classified service law) provided for removal in case of deficient employee performance, lack of work, or for other "good and just" cause and thus contained ". . . ample reservations in aid of the efficient administration of the school system." Thus, it may be said here, where adequate procedures for removal exist, and where Dr. Bowman's performance was at all times "meritorious" (Appendix p. 26a), that the State's interest in "responsive" administration is not, within the context of the State's merit-oriented scheme, a justification for denying the process due Dr. Bowman. This conclusion is further reinforced by the fact that the alleged interest in "responsiveness" or in declaring this position a "policy-making" one appears nowhere in the legislative record, but is a justification constructed after the fact by counsel for the State.

Conceding that "this particular act arguably may have resulted in an injustice to a long-term office holder," the court below observed that "[o]ne of the perpetual risks of public employment is an abolition of a position by the legislative branch of government." Appendix p. 13a. That may be so, but such was not the case here. Dr. Bowman's position was not abolished. Here, the Maine Legislature retained the position, but abolished the civil service status protecting the holder of that position, so as to expose him to immediate and arbitrary termination. Such injustice is not "due process of law"

under the Fourteenth Amendment to the United States Constitution

Conclusion.

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

PETER L. MURRAY,
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February 28, 1980.

APPENDIX

MAINE SUPREME JUDICIAL COURT

DECISION NO. 2201

LAW DOCKET NO. KEN-78-21

PETER W. BOWMAN, M.D.

Appellant,

- v -

MAINE STATE EMPLOYEES APPEALS BOARD, et als.

Appellees.

ARCHIBALD, J.

In 1971 Peter W. Bowman, M.D., was a classified state employee, serving as Superintendent of Pineland Hospital and Training Center (Pineland). P.L. 1971, ch. 350, removed Dr. Bowman's position from classified state service and created a 4-year term in the unclassified state service for the superintendency of Pineland. Dr. Bowman was not appointed to this position by the Commissioner of Mental Health and Corrections. He appealed to the Maine State Employees Appeals Board (Board), which

rejected his appeal. Dr. Bowman then sought review of the Board's decision by instituting an action pursuant to Rule 80B, M.R.Civ.P. A justice of the Superior Court ruled the Board had correctly determined that no First and Fourteenth Amendment rights had been violated and denied the 80B action which sought "appeal and reversal" of the decision of the Board. From this judgment Dr. Bowman has appealed. We deny the appeal.

At the time of his dismissal from state service, Dr. Bowman had served the state for approximately eighteen and one-half years. Originally, he was appointed Superintendent of what was then Pownal State School (later Pineland). Some four years later that position was brought within the classified civil service system as a result of the enactment of P.L. 1957, ch. 313,[1] but fourteen years later was removed therefrom and, together with the positions of superintendent of the Augusta and Bangor Mental Health Institutes, was added to the unclassified service by the enactment of P.L. 1971, ch. 350, § 1, amending 5 M.R.S.A. § 711(2)(A)(13).

1. A classified state employee is given a status and awarded certain rights distinguishable from a state employee who is in the unclassified service. See for comparison, 5 M.R.S.A. §§ 671-679-A and 5 M.R.S.A. § 711.

Dr. Bowman's appeal is focused primarily on constitutional grounds. Initially, he asserts that the termination of his public employment violated concepts of due process under both the United States and Maine Constitutions. Secondly, he contends that the application of P.L. 1971, ch. 350, to him violated his contractual due process rights. His final position is that the 1971 act contravened an existing contract with the State of Maine and, therefore, violated the contract clauses of both the United States and Maine Constitutions.

It is basic to our resolution of this appeal to determine whether a contractual relationship had in fact existed between Dr. Bowman and the state. If there were no such relationship, then Dr. Bowman's dismissal could not violate any rights he then had as a member of the classified service. Furthermore, if his position was not constitutionally protected, the 1971 Legislature was free to enact chapter 350 without regard to its application to Dr. Bowman. Therefore, we turn initially to the question of whether the contract clauses can avail Dr. Bowman in his quest for a declaration that his dismissal was improper. This is the same approach taken by a three judge District Court[2] faced with a challenge from several Massachu-

2. Coffin, Chief Circuit Judge; and Pettine and Freedman, District Judges.

setts justices who were claiming that both the due process clause, U.S. Const. amend. XIV, § 1, and the contract clause, U.S. Const. art. I, § 10, cl. 1, protected them from the provision of a newly enacted statute mandating retirement at age seventy. The court held: "Since the claimed right is one alleged to be created by contract, we must first ascertain whether a protectable right exists, before we reach the question whether its deprivation involves a violation of due process." Kingston v. McLaughlin, 359 F.Supp 25, 28 (D. Mass. 1972).

Does a public employee have such a relationship to the government, whether state or federal, that he can invoke the contract clause[3] in the event his position is terminated by legislative act?

Our reading of decisions of the United States Supreme Court, as well as those of courts of last resort of several of our sister states, leads us to conclude that public employment is not necessarily premised on contractual concepts.

Contracts with governmental agencies may be constitutionally protected, however, provided that there is legislative authority for the agencies to enter into a contractual relationship. When such a relationship is created, the contract clause

3. Me. Const. art. I, § 11.

protects against any subsequent dilution of contractual obligation. In the recent case of the United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977), it was held that legislative enactments of the State of New York and the State of New Jersey violated the contract clause when a certain source of income was removed from its previously dedicated status, this source of income having been dedicated to bond amortization when the Port Authority of New York and New Jersey had issued its bonds. The Supreme Court held that since both states had statutorily authorized the issuance of bonds supported by dedicated revenues, the bonds, when issued, created a contract between the Port Authority and the holders thereof. The court pointed out that the initial covenant "constituted a contract between the two states and the holders of the Consolidated Bonds," and that "the intent to make a contract is clear from the statutory language." 431 U.S. at 18.

Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938), construed the relationship between a tenured school teacher and her employer, commenting that "[t]he courts of Indiana have long recognized that the employment of school teachers was contractual." The court there held that the repeal of a statute some nine years after tenure rights had been established was an impairment of the teachers' contractual rights and protected by the contract clause. Id. at 105.

Phelps v. Board of Education, 300 U.S. 319, 322 (1937), was a case where the New Jersey Supreme Court had construed a New Jersey statute as failing to establish a contractual relationship between the state and a school employee. The United States Supreme Court, reflecting its respect for a state court's interpretation of its own statues, approved that conclusion.

The United States Supreme Court, again giving great weight to the views of a state court in construing its own statutes, followed its decision in Phelps by upholding an act of the Illinois Legislature which had challenged under the contract clause. The court held:

> On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.

Dodge v. Board of Education, 302 U.S. 74, 78-79 (1937) (citations omitted).

In recent years various state courts under a variety of circumstances have been faced with determining whether a contractual relationship

existed between a person and the governmental agency employing such person. The Pennsylvania Court has held that unless the statute authorized the creation of a contractual relationship:

> An appointment to a public office for a fixed term and salary is not a contract within the protection of the constitution. . . . The compensation is incidental to the office and is governed by the right thereto. The emoluments are annexed to the office and not to the person; hence the salary belongs to the officer, de jure. If the officer is properly dismissed, the salary ceases.

Naef v. City of Allentown, 424 Pa. 597, 601, 227 A.2d 888, 891 (1967). See also Vega v. Borough v. Burgettstown, 394 Pa. 406, 409, 147 A.2d 620, 622 (1959).

The California courts carefully distinguished between the rights which have become vested under the terms of employment and those which are of a continuing nature. Betts v. Bd. of Admin. of Pub. Emp. Ret. System, 148 Cal. Rptr. 158, 582 P.2d 614 (1978).

In Miller v. State, 135 Cal. Rptr. 386, 389, 557 P.2d 970, 973 (1977), the California Supreme Court was faced with a problem somewhat similar to that now before us. Miller was employed in state service as Chief Inheritance Tax attorney and, because of a change in statutory retirement provisions, was compelled to retire after thirty-five years of service at the age of sixty-seven. Had the law which governed during most of his service

been retained, he would have been able to serve three additional years and thus to increase his monthly pension by nearly $500. In construing a 1971 act which Miller had argued violated the United States; as well as the State's constitutional provisions against the impairment of contracts, the California Court held:

> [P]ublic employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law. . . . Nor is any vested contractual right conferred on the public employee because he occupies a civil service position since it is equally well settled that '[t]he terms and conditions of civil service employment are fixed by statute and not by contract.'

135 Cal. Rptr. at 389, 557 P.2d at 973 (citations omitted), quoting Boren v. State Personnel Board, 37 Cal.2d 34, 641, 234 P.2d 981, 985 (1951).

The Georgia court, construing an act which repealed a city charter resulting in the loss of employment by several municipal officials, held:

> The act of the General Assembly revoking the charter of the City of Mountain View does not operate to impair the obligation of contracts claimed under by the parties . . . in violation of state and federal Constitution. . . . The right of an incumbent to an office depends upon the law under which he holds. If the law is capable of being repealed, the right of the officer is gone.

City of Mountain View v. Clayton Cty., 242 Ga.

163, 167-168, 249 S.E.2d 541, 544 (1978). Other jurisdictions have reached similar conclusions. See, e.g., Fazekas v. University of Houston, 565 S.W.2d 299, 307 (Tex. Ct. App. 1978); State ex rel. Utilities Com'n v. Virginia E. & Power Co., 285 N.C. 398, 206 S.E.2d 283 (1974); Schmidt v. Masters, 490 P.2d 1029 (Or. App. 1972); Reynolds v. Comm. of Commerce and Development, 214 N.E.2d 69 (Mass. 1966); City of Elizabethtown v. Cralle, 317 S.W.2d 184 (Ky. 1958); Houghton v. School Committee of Somerville, 306 Mass. 542, 28 N.E.2d 1001 (1940).

Applying the foregoing concepts to the facts of this case, it is our conclusion that Dr. Bowman did not have a relationship with the State of Maine governing his employment at Pineland which was protected by either the contract clause in the Maine Constitution or that of the Constitution of the United States. The position of Superintendent of Pineland was brought under the classified service in 1957, four years after Dr. Bowman began his employment. The 1957 act related to the position of Superintendent of Pineland and not to Dr. Bowman personally. It cannot be gainsaid that if the 1957 Legislature had the power to include this position under the classified service, the 1971 Legislature likewise had the power to remove it therefrom. Shamberger v. Ferrari, 314 P.2d 384, 387 (Nev. 1957). It must be remembered that we are not concerned with Dr. Bowman's right to

whatever emoluments he may be entitled to as a result of his years of service. Betts v. Bd. of Admin. of Pub. Emp. Ret. System, supra. We are concerned only with his right to continue in his position as Superintendent of Pineland.

We are further supported in our conclusion by the phraseology of the 1957 act placing the superintendency of Pineland in the classified service. There was no language in that act authorizing the execution of a continuing type of employment contract, as was the case in Indiana ex rel. Anderson v. Brand, supra.

The Maine legislature had demonstrated its ability to delegate to governmental agencies the authority to enter into contractual relations with others. The educational field is illustrative.

20 M.R.S.A. § 58 provides:

> The Commissioner of Educational and Cultural Services is authorized to enter into a contract with any academy or institute, which is serving one or more communities in lieu of a public secondary school, for the conduct of a vocational course or vocational courses which meet the same standards for approval as those conducted in public secondary schools. [emphasis supplied]

20 M.R.S.A. § 153 empowers a school committee to "contract" with a superintendent "for a term of not more than 5 years." Section 161(5) of that title authorizes school officials to execute contracts for tenured teachers, with the added power to extend "the contract . . . automatically

for one year" but subject to "the right to an extension for a longer period of time through a new contract."

We have recognized that a contract between a teacher and his governmental employer is enforceable for its breach and that such an employer is bound by its terms. Kenaston v. School Administrative District #40, Me., 317 A.2d 7, 10 (1974). Even so, a teaching contract, since it cannot guarantee an unalterable future rate of pay, only creates a vested right to the salary earned under the contract. Sawin v. Town of Winslow, Me., 253 A.2d 694, 700 (1969).

By contrast, P.L. 1957, ch. 313, merely provided that the "commissioner shall have the power to appoint institutional heads as shall be necessary." (emphasis supplied) Thus, statutory authority to contract for a continuation of the right to employment did not exist.

Having determined that P.L. 1971, ch. 350, was validly enacted and cannot be said to have violated either contract clause, we dispose of Dr. Bowman's argument that his right to due process was infringed. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

As we read P.L. 1971, ch. 350, its rationality is self-apparent. The three state operated mental institutions, Augusta and Bangor Mental Health Institutes, and Pineland, were placed in the same

administrative category, and the appointment of the three superintendents was centralized under the control and supervision of the Commissioner of Mental Health and Corrections. 34 M.R.S.A. § 1. The commissioner's term is "coterminous with the governor." P.L. 1971, ch. 350, § 3, specified that the appointment of any of the superintendents be for "a term of 4 years . . . or during the pleasure of the commissioner." It would thus appear the legislature deemed it appropriate that the term of office of the superintendent of any of the three mental institutions be compatible with that of the Commissioner of Mental Health and Corrections who, in turn, would serve at the pleasure of the governor.[4]

4. We viewed with approval such legislative rationale in Longley v. State Emp. Appeals Bd., Me., 392 A.2d 529, 532 (1978), when we commented regarding a policy-making position:

> It is a policy-making position similar to that of a cabinet minister's on the federal level. A new Governor is entitled to fill such a position with a person of his own choosing. He is not required to work with the appointees of a previous administraton, whose loyalties and policies might be wholly different from his own.

It is a logical extension of the philosophy in Longley to say that a Commissioner of Mental Health and Corrections should be entitled to his own appointees as superintendents of the three hospitals since the legislature has mandated that these institutions be under the "control and supervision" of the Commissioner, the superintendencies being legislatively defined as "major policy-making positions." 5 M.R.S.A. § 711(2)(A).

The fact that this particular act arguably may have resulted in an injustice to a long-term office holder may not serve as a basis of a due process challenge to legislation rationally related to a legitimate legislative purpose. One of the perpetual risks of public employment is an abolition of a position by the legislative branch of government.

Dr. Bowman's due process arguments must fail. As this was the situation in Kingston v. McLaughlin, 359 F.Supp. 25 (D. Mass. 1972), the root from which these due process contentions sprout is the premise that Dr. Bowman's position was contractually secured, a premise we have here disavowed. The foundation of the due proces argument having been eliminated, the argument itself must collapse.

The South Carolina Court has used appropriate language:

> 'Public officers are created for the benefit of the commonwealth, incumbents have no contract of property rights in them, and, unless it be otherwise provided by the Constitution, they are subject entirely to legislative control. Hence, subject to the Constitution, the General Assembly may fix the term, provide for removal, abolish the office, reduce the term, and in every respect control the existence, powers, emoluments, and tenure of public officers.'

Wright v. City of Florence, 93 S.E.2d 215, 220 (S.C. 1956), quoting State v. Rhame, 75 S.E. 881, 883 (1912).

We conclude that P.L. 1971, ch. 350, as it related to the superintendent of the Pineland Hospital and Training Center, does not violate the contract clause of either the United States or Maine Constitutions by placing the position in the unclassified service.

The entry is:

Appeal denied.
Judgment affirmed.

POMEROY and DELAHANTY, JJ., did not sit.

McKusick, C.J.; Wernick, Godfrey, and Nichols, J.J., concurring.

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STATE OF MAINE SUPERIOR COURT
KENNEBEC, SS.

CIVIL ACTION NO. 74-514

PETER BOWMAN, M.D.
Plaintiff
- v -
WILLIAM KEARNS, et al.,
Defendants
- v -
MAINE STATE EMPLOYEES APPEALS BOARD,
Defendants.

* * * * * *

CIVIL ACTION 74-517

DEPARTMENT OF MENTAL HEALTH AND CORRECTIONS
OF THE STATE OF MAINE
Plaintiff,
- v -
MAINE STATE EMPLOYEES APPEALS BOARD,
Defendant
and
PETER W. BOWMAN, M.D.,
Defendant

DECISION AND ORDER

This matter is before the court on cross appeals of a decision of the State Employees Appeals Board. In the first appeal (Cv-74-514), the Plaintiff, Peter W. Bowman, appeals the decision of the State Employees Appeals Board and petitions for declaratory judgment. In addition, Plaintiff Bowman has joined with his appeal action a tort claim against the State and William Kearns. The Department of Mental Health and Correctons has appealed the decision of the State Employees Appeals Board (CV-74-517). The actions have been consolidated. For the purpose of this decision, Peter W. Bowman shall be regarded as the Plaintiff and the State of Maine, et als shall be regarded as the Defendants.

Background of the Case.

In 1953 the Plaintiff, Peter W. Bowman, was appointed to the positon of superintendent of the facility now known as the Pineland Hospital and Training Center (hereinafter "Pineland"). The appointment was to a position in the unclassified service. In 1957 the position was shifted to the classified service. Thus, in 1971, Peter Bowman was a classified employee of the Department of Mental Health and Corrections and Superintendent of Pineland Hospital and Training Center, an insitution for the mentally retarded operated by the Department of Mental Health and Corrections.

On May 25, 1971, Governor Curtis signed into law Chapter 350, P.L. 1971, "AN ACT to Provide Hospital Administrators under the Department of Mental Health and Corrections." That law became effective on September 23, 1971. It removed from the classified service the superintendent positions of the three principal state institutions for the mentally ill and the mentally retarded, the Pineland Hospital and Training Center, the Augusta State Hospital, and the Bangor State Hospital. Chapter 350 placed these positions in the unclassified service, with a term of four years, the appointment to be made by the Commissioner of Mental Health and Corrections with the advice of an Advisory Committee on Mental Health.

On July 16, 1971, Defendant William Kearns, the then Commissioner of Mental Health and Corrections, informed Dr. Bowman that, upon the effective date of Chapter 350, he would not appoint him to the superintendency of the Pineland Hospital and Training Center. Dr. Bowman filed a grievance with the State Employees Appeals Board on September 10, 1971. After some litigation, the grievance was heard by the State Employees Appeals Board on May 29, 1974, and a decision was issued September 30, 1974. The Board decided inter alia that:

(1) The Board was not determining whether P.L. 1971, ch. 350, was constitutional, but that the Board was bound by Chapter 350;

(2) There was no violation of Dr. Bowman's First or Fourteenth Amendment rights in the changes in job status precipitated by the statute;

(3) The Board ordered the Department to:

(a) "pay Dr. Bowman the sum of $5,310 (ten weeks' pay) to aid him in satisfying his financial burden," and

(b) "pay the Maine State Retirement System sufficient monies to increase Dr. Bowman's retirement allowance upon his attainment of age 60 to equate his benefits with 20 years of service."

Both parties appealed from this decision. Plaintiff Bowman's original complaint (CV-74-514), dated October 28, 1974, sought an 80B appeal to reverse the State Employees Appeals Board decision and have Dr. Bowman be reinstated to his position with back pay. Alternatively, the Plaintiff sought a declaratory judgment that Chapter 350 was unconstitutional.

The State's appeal (CV-74-517), dated October 30, 1974, sought to reverse the State Employees Appeal Board decision on the grounds that the Board lacked jurisdiction over the matter and that it acted beyond its authority in awarding the relief which it awarded to the Plaintiff.

Subsequently, on March 25, 1975, the Plaintiff amended his complaint to broaden the relief requested to include a tort claim for damages against the Defendant.

After several assignments of judges and referees, the case came before this Court. After filing of pretrial memoranda, the Court held a pretrial conference on September 21, 1977, and ordered that Briefs be submitted. Subsequently, after submission of briefs, the court met again with the parties on December 30, 1977, to seek further refinement of the issues.

The Status of the Proceedings.

These appeals have combined requests for 80B review of administrative decisions with requests, by the Plaintiff, that the Court adjudicate declaratory judgment and tort claims de novo. There is a rather extensive record of the State Employees Appeals Board proceeding. Therefore, in reviewing that proceeding, the Court must act in its appellate capacity based on the administrative record.

This decision is limited to questions arising from the State Employees Appeals Board decision. The Court has deferred hearing on the tort claims and any other matters in which it is asked to sit de novo pending decision of the 80B appeals. The 80B appeals are thus separated for consideration and final decision herein.

Constitutionality of Chapter 350.

The Court has reviewed the briefs of the parties on the question of constitutionality of P.L. 1971, Chapter 350. The Court determines that for the purpose of these proceedings, the Court will presume the constitutionality of P.L. 1971, Chapter 350. If there is to be a determination that Chapter 350 is unconsitutional, and such determination is not suggested, it would be more appropriately made on appellate review by the Supreme Judicial Court.

Findings and Conclusions.

Based on the record before the State Employees Appeals Board and the briefs and arguments of the parties, the Court makes the following findings and conclusions:

1. The essential dispute in this case is whether the Plaintiff should have been appointed to the unclassified position of Superintendent of the Pineland Hospital created by Chapter 350. The Court finds that such a question is beyond the jurisdiction of the State Employees Appeals Board, as the question of who shall (and who shall not) be appointed to unclassified positions is a matter within the exclusive discretion of the appointing authority, here the Commissioner of Mental Health and Corrections.[5] Accordingly, since the State

5. Acting with the advice and consent of the Advisory Committee on Mental Health.

Employees Appeals Board was without jurisdiction to consider the matter, its decision must be reversed and remanded with the grievance to be dismissed for lack of jurisdiction.

2. Recognizing that the parties have already been in litigation in this matter a considerable period of time, the Court determines that it is appropriate to consider the substantive questions, despite its determination on the jurisdictional issue so that the entire matter of the 80B appeals may be presented on any appeal without further necessity for proceedings in this Court. Accordingly, as an alternate to its finding on the general jurisdictional issue, the Court finds that:

(a) The finding of the State Employees Appeals Board that there was no violation of the Plaintiff's First and Fourteenth Amendment rights is not arbitrary and is supportable by evidence in the record. As that finding is supportable by evidence in the record, it is not subject to reversal by this Court.

(b) The State Employees Appeals Board's determination that the Plaintiff be paid $5,310 to aid him in satisfying his financial burden was beyond the jurisdiction of the Board, and, in any event, is not supportable by evidence in the

record. The award of $5,310 was, in effect, a directive that the State pay the Plaintiff additional compensation despite the Board's findings in favor of the State on the basic substantive issues. Such awards of compensation are beyond the jurisdiction of the State Employees Appeals Board, 5 M.R.S.A. § 752. In addition, a review of the record discloses no evidence of any particular financial burden of Dr. Bowman and certainly no evidence to support a finding that his financial burden is a sum certain, to wit: $5,310. Further, such a grant of money by the State Employees Appeals Board is arbitrary and capricious and beyond the Board's authority when the Board in fact has decided that the State acted within its authority.

(c) The State Employees Appeals Board order directing the Defendant to pay the Maine State Retirement System sufficient monies to increase the Plaintif's retirement allowance upon his attainment of age 60 to equate his benefits with 20 years of service is also beyond the jurisdiction of the State Employees Appeals Board as this matter also is a

matter of compensation which the State Employees Appeals Board cannot consider. 5. M.R.S.A. 752. Further, the award of a retirement allowance above that to which Plaintiff would be entitled for his actual service is arbitrary and capricious and beyond the Board's authority when the Board in fact has decided that the State acted within its authority. The effect of the grant of a retirement allowance is to award the Plaintiff a significant portion of the benefits which would have accrued to a person appointed to the unclassified position even though the Plaintiff was not appointed to that position.

Accordingly, it is:

(1) ORDERED that those elements of the pending action in Docket No. 74-514 and the entire action in Docket No. 74-517, which seek review of the decision of the State Employees Appeals Board in the matter of the grievance of Peter W. Bowman, be and hereby are separated from the remainder of the proceedings for consideration and final decision.

(2) ORDERED that the portion of Civil Action No. 74-514 which seeks appeal and reversal of the decision of the State Employees Appeals Board shall be denied.

(3) ORDERED that the appeal of State Employees Appeals Board decision sought by Civil Action No. 74-517 is granted.

(4) ORDERED that the decision of the State Employees Appeals Board in the matter of Peter W. Bowman be and hereby is reversed and remanded to the State Employees Appeals Board with instructions that the grievance be dismissed for lack of jurisdiction.

Dated: 2/11/78

S/ William E. McCarthy
WILLIAM E. McCARTHY
Justice, Superior Court

STATE OF MAINE
KENNEBEC, SS.

STATE EMPLOYEES APPEALS BOARD
DOCKET NO. 71-4

IN RE: PETER BOWMAN, M.D.
Grievant
MAINE DEPARTMENT OF MENTAL HEALTH AND CORRECTIONS
Employer

DECISION

Hearing on the merits of the above appeal was heard by the Board in Augusta on May 29, 1974.

APPEARANCES:

Stephen Sunenblick, Attorney for Grievant
Courtland Perry, Attorney for Employer

The grievant initiated his grievance on September 10, 1971 while he still served, with distinction, as Superintendent of the Pineland Hospital and Training Center. Subsequently, the employer filed a Motion to Dismiss for Want of Jurisdiction which was denied by this Board on December 10, 1971, which decision was then appealed to the Superior Court for Kennebec County and then

to the Supreme Judicial Court of Maine, who rendered its decision on July 31, 1973 and affirmed the dismissal entered by the Superior Court.

The grievant has actively and thoroughly pursued this matter and is to be commended by the Board and similarly situated state employees.

The Motion to Dismiss of the employer filed September 15, 1971, and reasserted at the hearing on the merits and in employer's argument dated August 2, 1974, is denied. The Board specifically finds that it has proper jurisdiction under Title 5. M.R.S.A. § 752 to mediate the final settlement of the grievances and disputes that are presented by the grievant.

The Board finds that Dr. Bowman devoted his best professional efforts to his employer from April 1953 to September 23, 1971--approximately 18 1/2 years--and did an outstanding and meritorious job.

This matter centers on the action of the 105th Maine Legislature (P.L. 1971, Chapter 350) which eliminated three jobs from the classified service and give the Commissioner of Mental Health and Correction the responsibility of appointing individuals to the superintendencies.

The Board is specifically not judging whether or not P.L. 1971, Chapter 350 was proper or improper, fair or unfair, constitutional or unconstitutional. It can try to determine if as a result of this law

an aggrieved state employee has suffered an injustice which the Board has the power to rectify. It is the considered opinion of this Board that:

1. The Board is bound by law as enacted by the Legislature.
2. Although the law precipitated three changes in job status, there was no violation of the 1st or 14th amendment and Dr. Bowman's claim for reinstatement is denied.
3. Dr. Bowman has been put to a great deal of expense in pursuing his claim before the SEAB for redress of his grievance.

It is the judgment of this Board that the manner in which the State informed or conveyed the message to Dr. Bowman of his non-appointment should have been carried out in a more equitable manner in which his long and distinguished career was recognized.

The more equitable practice, in view of the Board, would have been to have had the employer communicate with the employee and more thoroughly discuss the job qualifications and any personality conflicts prior to a final employer decision as to the appointment.

In view of the many mitigating circumstances in this case, and the unfair manner in which all aspects of the employee's tenure and non-retention were handled, but since the Board feels constrained

by the legislation, it is the order of this Board that the sum of $5,310 (10 weeks pay) be paid to the grievant to aid him in satisfying his financial burden and the employer is further ordered to pay to the Maine State Retirement System sufficient monies to increase the grievant's retirement allowance upon his attainment of age 60 to equate his benefits with 20 years of service.

Dated this 30th day of September, 1974.

S/ Samuel D. Shapiro
Samuel D. Shapiro

S/ Alexander C. Miller
Alexander C. Miller

S/ Richard G. Sawyer
Richard G. Sawyer

SEPARATE AND CONCURRING OPINION

In Re: Peter Bowman, M.D.

I join with other members of the Board in the above decision and result but I would like to more specifically set forth the mitigating circumstances that I felt most unfair.

The employer did not specify sufficient reasons to the employee for not appointing him Superintendent of Pineland Hospital and Training Center. Without specific reasons, I would have to assume that Dr. Bowman should have been appointed.

It is not satisfactory to me that there may have been a personality conflict between the Commissioner and Dr. Bowman. At the very least, a meeting should have been held before a final decision was made. At this time, Dr. Bowman would have had an opportunity to persuade the commissioner to appoint him. Matters concerning his qualifications, past performance, and facts surrounding his job as Superintendent could have been explored.

The employer chose to unilaterally not appoint Dr. Bowman for vague and unknown reasons. This was unfair and unjust. It leaves great doubt in my mind that the decision not to appoint the grievant by the employer was correct and just.

S/ Samuel D. Shapiro
Samuel D. Shapiro

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Article 1, Section 10, Clause 1:

No State shall . . . pass any . . . Law impairing the obligation of contracts . . .

Amendment 14, Section 1:

. . . nor shall any State deprive any person of life, liberty, or property without due process of law . . .

Laws of Maine

P.L. 1971, Ch. 350.

AN ACT to Provide Hospital Administrators under the Department of Mental Health and Corrections

Be it enacted by the People of the State of Maine, as follows:

Sec. I. R.S., T. 5, § 711, sub-§ 11, additional. Section 711 of Title 5 of the Revised Statutes, as amended, is further amended by adding at the end a new subsection 11 to read as follows:

II. Superintendents of institutions. The Superintendent of the Augusta State Hospital, the Superintendent of the Bangor State Hospital and the Superintendent of the Pineland Hospital and Training Center.

Sec. 2. R. S., T. 34, § I, amended. The 4th and 5th sentences of the 2nd paragraph of section 1 of Title 34 of the Revised Statutes are amended to read as follows:

Said commissioner shall have the power to appoint insitututional heads as shall be necessary for the proper performance of the duties of said department . . .; such appointments shall be subject to the Personnel Law, except as otherwise provided in this Title. He may appoint such other employees as may be necessary . . .; such other appointments shall be subject to the Personnel Law, except as otherwise provided in this Title.

Sec. 3. R. S., T. 34, § 2102, repealed and replaced. Section 2102 of Title 34 of the Revised Statutes, as amended by section 1 of chapter 237 of 1967, is repealed and the following enacted in place thereof:

§ 2102. Superintendents; appointment of; power and duties

The head of each hospital shall be called the superintendent. The commissioner shall, with the advice and consent of the Advisory Committee on Mental Health, appoint, and set salaries for, the superintendent of each hospital. The appointments shall be for a term of 4 years and until his successor is appointed and qualified, or during the pleasure of the commissioner and the Advisory Committee on Mental Health. The superintendent shall be a qualified psychiatrist, a qualified hospital administrator, a licensed psychologist, or a person with a master's degree in social work, public administration or public health. In making the appointment, the commissioner and advisory committee shall give due consideration to the appointee's qualifications and experience in administration, and to his qualifications and experience in health matters. The superintendent shall have general superintendence of the hospital and grounds under the direction of the department,

and shall receive all patients in need of special care and treatment, legally sent to the hospital, that the accommodations permit, subject to the regulations of the department.

Sec. 4. R. S., T. 34, § 2151, repealed and replaced. Section 2151 of Title 34 of the Revised Statutes, as amended by section 2 of chapter 237 of the public laws of 1967, is repealed and the following enacted in place thereof:

§ 2151. Purposes

Pineland Hospital and Training Center, heretofore established at New Gloucester in the County of Cumberland, shall be maintained for the training, education, treatment and care of persons who are mentally retarded and of persons who are between the ages of 6 and 16, except as provided in section 2155, who are mentally ill.

The head of the Pineland Hospital and Training Center shall be called the superintendent. The commissioner shall, with the advice and consent of the Advisory Committee on Mental Health, appoint, and set the salary for the Superintendent of the Pineland Hospital and Training Center. The appointment shall be for a term of 4 years and until his successor is appointed and qualified, or during the pleasure of the commissioner and the Advisory Committee on Mental Health. The superintendent shall be a qualified psychiatrist, a qualified hospital administrator, a licensed psychologist, or a person with a master's degree in social work, public administration or public health. In making the appointment, the commissioner and advisory committee shall give due consideration to the appointee's qualifications and experience in administration, and to his qualifications and experience in health matters. The superintendent shall be responsible for the training, education, treatment and care of all persons received into the Pineland Hospital and Training Center. He shall be responsible for the release of all such persons, except those placed

in the Pineland Hospital and Training Center under Title 15, sections 101 or 103. He shall have direct supervision, management and control of the grounds, buldings and property and officers and employees of the Pineland Hospital and Training Center, subject to the approval of the department.

P.L. 1947, Ch. 192, § 1.

The superintendent of a state institution within the jurisdiction of the department of institutional service may be removed by the commissioner, with the approval of the governor and council, for inefficiency, failure to perform duties properly or other good cause. The superintendent shall be notified of the proposed action, shall be furnished with a copy of the reasons therefor and shall be given a hearing before the commissioner and the governor and council, and be allowed to answer the charges preferred against him, either personally or by counsel. Within 20 days after such hearing the superintndent may bring a petition in the superior court within and for the county where the institution is located, praying that the action of the governor and council may be reviewed . . . [The court] shall review such action, hear the witnesesses, and shall affirm the decision . . . unless it shall appear that such decision was made without proper cause or in bad faith, in which case such decision shall be reversed and the petitioner be reinstated in his office without loss of compensation.

P.L. 1957, Ch. 313.

R. S., c. 27, § I, amended. The 6th sentence of the 2nd paragraph of section I of chapter 27 of the Revised Statutes is hereby amended to read as follows:

'Said Commissioner shall have the power to appoint institutional heads as shall be necessary for the proper performance of the duties of said Department, . . . subject to the provisions of the Personnel Law.'

R.S. 1954, Ch. 63, § 21.

An appointing authority may dismiss, suspend or otherwise discipline a classified employee for cause. In every case of such dismissal, suspension or other disciplinary action, at the request of the employee, the board shall investigate the circumstances relating to the action, and the fairness thereof, and if it shall find the charges unwarranted, the board shall order the immediate reinstatement of the affected employee to his former position with no loss of pay, seniority or other rights and benefits resulting from the dismissal or disciplinary action. At the request of the employee the board may recommend the transfer of the employee to the same or similar class of position in another department or institution. Such transfer shall be made to such department or institution only with the approval of the appointing authority thereof.

At the request of the employee, the board shall investigate the circumstances relating to an action of an appointing authority which lays off, demotes or otherwise deprives an employee of rights established by chapters 51 to 61 or by rules prescribed in section 592, subsection 2, and if shall find the action contrary to chapters 51 to 61 and rules, the board shall order the immediate reinstatement of the employee to his former position with no less of pay, seniority or other rights or benefits resulting from such action.

5 M.R.S.A. § 671.

The classified service shall consist of all persons holding offices and employments now existing or hereafter created in the state service, except persons who are holding or shall hold offices and employments exempted by section 711.

Appointments to and promotions in the classified service shall be made according to merit and fitness, from eligible lists prepared upon the basis of examinations, which so far as practicable shall be competitive. No person shall be appointed, transferred, promoted or reduced as an officer, clerk or employee or laborer in the classified service in any manner or by any means other than those prescribed in chapters 51 to 67 and in the rules made in pursuant to chapters 51 to 67.

The classified service shall be separated into the following divisions:

Competitive and noncompetitive, in accordance with rules and regulations prescribed by the commissioner.

5 M.R.S.A. § 678.

An appointing authority may dismiss, suspend or otherwise discipline an employee for cause. This right is subject to the right of appeal and arbitration of grievances set forth in sections 751 to 753; and said sections 751 to 753 shall apply only to any employee who has attained permanent status in such employment.

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Ken-78 21

PETER W. BOWMAN, M.D.,
Appellant

- v -

MAINE STATE EMPLOYEES APPEALS BOARD, et. al.
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Peter W. Bowman, M.D., Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of Maine affirming the denial of the appeal from the decision of State Employees Appeals Board entered in this action of December 4, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: February 19, 1980.

Murray, Plumb & Murray
30 Exchange Street
Portland, Maine 04101
(207) 773-5651

S/ E. Stephen Murray
E. Stephen Murray

S/ Peter L. Murray
Peter L. Murray
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 1980, copies of this notice were mailed, postage prepaid, to:

Robert J. Stolt
Deputy Attorney General
State House
Augusta, ME 04333

Morton A. Brody, Esq.
Levine, Brody & Levine
173 Main Street
Waterville, ME 04901

Attorneys for Maine State Employees Appeals Board.

I further certify that all parties required to be served have been served.

Dated: February 19, 1980

Murray, Plumb & Murray
30 Exchange Street
Portland, ME 04101

S/ E. Stephen Murray
E. Stephen Murray

S/ Peter L. Murray
Peter L. Murray
Attorneys for Appellant

State of Maine
Clerk of the Law Court
February 20, 1980
Received and Filed